Hastings Communications and Entertainment Law Journal

Volume 2 | Number 4 Article 5

1-1-1980

Peeking behind Judicial Robes: A First Amendment Analysis of Confidential Investigations of the Judiciary

Cydney Ann Hurowitz

Peeking Behind Judical Robes:
A First Amendment Analysis of Confidential Investigations of the Judiciary

By CYDNEY ANN HUROWITZ*

Introduction

Judges wield great power in our society and such power may easily be abused. In the 1960's and 70's, many states established commissions on judicial performance to investigate the complaints against judges and to provide for an effective process to discipline and remove judges. Recently, the investigation of the California Supreme Court has brought into focus the fact that many of the operations of such commissions are confidential.

This confidentiality has not been challenged. Yet confidential judicial or quasi-judicial hearings conflict with the public's right of access to government information, a component of the right to know which is protected by the free speech and free press clause of the First Amendment. The perimeters of this right of access are not clear; but this is a time when confidence in the ability of the legal system to dispense justice appears to be waning amid controversy over whether confidentiality of proceedings protects judicial process or merely deepens public suspicion about the courts.

This note will discuss the various state procedures and confidentiality rules, and the reasons behind them. The public's right to know and the interests furthered by open proceedings will then be analyzed. Finally, the conflict between these interests will be explored, and the constitutionality of confidentiality rules will be considered.

---

* Member, Third Year Class.

I

Procedures for the Investigation and Removal of Judges

Judicial misconduct is a disturbing problem. There is a public sense of unease about the quality of our judges. Extreme and sensational cases of misconduct are occasionally reported in the press. For example, a Georgia trial judge was disbarred in 1961 for offering "protection" to a businessman for money.[1] A Virginia judge was convicted in 1968 of seventeen counts of forgery and obtaining money under false pretenses.[2] A California judge was removed from office by the state Supreme Court after it was shown that he had prodded a deputy public defender with a "dildo" during a conference in chambers and had grabbed a Court Commissioner's testicles in a public corridor.[3] Still another California judge was removed after a finding that she had committed twenty-one acts constituting wilful misconduct in office and eight acts of "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[4]

These cases, however, are atypical; the usual case is less dramatic. The authority of a trial judge to control both the administration of the trial and the conduct of counsel can be abused when judicial functions are expanded and judicial power is used to sway the jury or to intimidate witnesses. Other types of misconduct include: excessive drinking; lack of punctuality; short hours; extreme rudeness to lawyers, litigants, and witnesses; insufficient trial preparation; and disability caused by health or age.[5]

The traditional methods of relief from such misconduct are impeachment, address, and recall. Impeachment is used in the federal system and in forty-six states. It is a legislative proceeding in which the lower house acts as a grand jury and the upper house acts as a trial court. This method is inadequate; it

1. Clinkscales v. State, 104 Ga. App. 723, 123 S.E.2d 165 (1961).

2. W.T. BRAITHWAITE, WHO JUDGES THE JUDGES? 5 (1971).

3. Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270, 110 Cal. Rptr. 201, 515 P.2d 1 (1973).

4. Cannon v. Commission on Judicial Qualifications, 14 Cal. 3d 678, 681, 122 Cal. Rptr. 778, 779, 537 P.2d 898, 899 (1975).

5. *See* BRAITHWAITE, *supra* note 2, at 5; Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F. L. REV. 244, 245-50 (1969).

is time consuming, expensive, and cumbersome because it requires mobilization of an entire legislature.

Address is a formal request from a state legislature to the governor asking for removal of a judge. This method is also inadequate for the same reasons as stated above.

Recall is used in seven states. If a designated percentage of the voters sign a petition to recall a judge, he must face a special election. The difficulties inherent in finding people with time to prepare and circulate a popular petition make recall as inadequate as impeachment and address.[6]

These three methods are in actuality rarely used. Impeachment is used more often than recall or address, but it is still employed only sporadically.[7] In federal courts, impeachment remains the only method of removal.[8]

Most states, however, have established alternative methods for investigation and removal of judges. Forty-seven states, the District of Columbia, and Puerto Rico now use such alternative methods for inquiring into judicial disability and misconduct.[9] Only three states have not followed the trend. In Maine judges may be removed only by impeachment or address,[10] while in Mississippi and Washington impeachment is the only means of removal.[11]

While each state's system is slightly different, they share certain features. Generally, a special commission is established to receive and investigate complaints against judges. The commissions are usually composed of judges, lawyers and citizens. The judges and lawyers are usually appointed by their peers, while the citizen representatives are commonly appointed by the governor. Upon receiving a complaint, or on their own initiative, these commissions conduct a preliminary investigation to determine whether there is cause for removal, forced retirement, or some other disciplinary measure.[12] Upon finding good cause, most order a formal hearing.[13] After the hearing, if a commission decides the charges have been sus-

6. Buckley, *supra* note 5, at 250.

7. BRAITHWAITE, *supra* note 2, at 13.

8. Chandler v. Judicial Council of the Tenth Circuit of the United States, 382 U.S. 1003, 1004-06 (1966) (Black, J., dissenting).

9. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 834 (1978).

10. ME. CONST. art. VI, § 4.

11. MISS. CONST. § 53; WASH. CONST. art. 5 § 2.

12. *See, e.g.*, IOWA CODE ANN. § 605.28 (West 1975).

13. *See, e.g.*, D. C. CODE § 11-1527 (1973).

tained, it files the charge with the state supreme court and recommends reprimand, censure, suspension, removal, or retirement.[14] In some states, a special court is convened to conduct this formal hearing.[15] Others provide for the appointment of special masters to fulfill that function.[16] With either system, the state supreme court has follow-up authority to decide the proper sanction.[17] The supreme court, in most state systems, reviews the record and may hear additional evidence if it desires.[18] The court then enters its order for whatever action it deems appropriate, or it may reject the commission's recommendation altogether and dismiss the charges.[19]

Forty-seven states provide for confidentiality of the judicial disciplinary proceedings,[20] though they differ as to the length of time confidentiality is compelled during and after these proceedings. In some states, confidentiality extends only through the preliminary investigation. If the commission decides there is a reasonable basis to charge a judge with misconduct or incapacity, it orders a formal hearing. At that time the charge becomes public, and all further proceedings are public.[21] In these states, the operation of the commission is similar to that of a grand jury.

Other states provide for confidentiality of commission proceedings until formal charges are filed with the supreme court. Then the record of the investigation and preliminary hearing is made public. All further proceedings are public.[22]

Four states provide for confidentiality of records and proceedings of the commission if a charge is filed with the supreme court, whose proceedings are governed by its regular

14. *See, e.g.*, GA. CONST. art. VI, § 13, ¶ III(b).

15. *See, e.g.*, OKLA. STAT. ANN. tit. 20, § 1658 (West Supp. 1979-80).

16. *See, e.g.*, IDAHO CODE § 1-2103 (1979).

17. *See, e.g.*, ARK. STAT. ANN § 22-145 (1962).

18. *See, e.g.*, NEB. CONST. art. V, § 30(2).

19. *See, e.g.*, PA. CONST. art. 5, § 18(h).

20. See Appendix for a list of state provisions.

21. ALA. CONST. art. VI, § 156(b), § 6.17 of Amend. No. 328 (1973); FLA. CONST. art. 5, § 12(D); ILL. CONST. art. 6, § 15(e); IND. CODE § 33-2.1-5-3(b) (1975); MINN. R. BD. ON JUD. STANDARDS 5; MO. COMM'N ON RETIREMENT, REMOVAL AND DISCIPLINE 12.23; OKLA. STAT. ANN. tit. 20, § 1658 (West Supp. 1979-80); WIS. STAT. ANN. § 757.93 (West 1980); W. VA. R. P. FOR HANDLING COMPLAINTS AGAINST JUSTICES, JUDGES AND MAGISTRATES 11-10.

22. ARK. STAT. ANN. §§ 22-145(f), 22-1004(b) (1979); IDAHO CODE § 1-2103 (1976); LA. R. JUD. COMM'N 10; MD. CONST. art. IV, § 4B(a); N.C. GEN. STAT. § 7A-377 (1979); N.Y. JUD. LAW § 44(7) (McKinney Supp. 1979); OR. REV. STAT. § 1.420(4) (1977); PA. CONST. art. 5, § 18(h); PA. R. P. JUD. INQUIRY & REV. BD. 20; S.C. SUP. CT. R. 33(b); TEX. CONST. art. 5, § 1a(10).

Rules of Civil Procedure.[23] The case is reported like other appeals.

Some states provide for confidentiality of all papers and proceedings but allow the final consideration by the supreme court to be public if the judge under investigation so requests.[24] In Utah and South Carolina, after the supreme court enters its final order, the record beomes available for public scrutiny, unless the discipline ordered is a private reprimand.[25] The District of Columbia and Virginia also allow disclosure if a subsequent perjury prosecution is initiated.[26]

Eleven jurisdictions allow the judge under investigation to waive confidentiality to some extent. In Arizona, the judge may request the release of information to the public.[27] Seven states give the judge the option of waiving confidentiality completely.[28] Under the latter system, if the judge so opts, the formal hearing and record of the preliminary investigation become public. In Kentucky and New York, the judge may request that the record be made public.[29] In the District of Columbia, if no grounds are found for the charge, the judge may request that the record be made public.[30] Otherwise, it remains confidential.

In ten states all papers filed and the proceedings of the commission are confidential, with only the final recommendation to the supreme court made public.[31]

Some states allow the commission discretion to issue a short statement to the public if (1) the investigation has already be-

23. GA. CONST. art. VI, § 13; KAN. STAT. § 20-176 (Supp. 1979); S.D. CODIFIED LAWS ANN. § 16-1A (1979); VT. SUP. CT. R. DISCIPLINARY CONTROL OF JUDGES 6(10).

24. D.C. CODE ANN. § 11-1528 (1973); HAW. REV. STAT. § 610-12(b) (1976); VA. CODE § 2.1-37.13 (1979).

25. S.C. SUP. CT. R. 33(b); UTAH CODE ANN. § 78-7-30(3) (1977).

26. D.C. CODE ANN. § 11-1528 (1973); VA. CODE § 2.1-37.13 (1979).

27. ARIZ. CONST. art. 6 § 1; ARIZ. R. P. COMM'N ON JUD. QUALS. 10.

28. CONN. GEN. STAT. §§ 51-511, 51-51n, 51-51j (1979); DEL. CONST. art. IV, § 37; DEL. R. P. CT ON JUD. 10(d); GA. CONST. art. VI, § 13; GA. R. JUD. QUALS. COMM'N 18; IND. CONST. art. 7, § 11(2); IND. CODE ANN. § 33-2.1-5-3(a) (1975); MINN. R. BD. OF JUD. STANDARDS 5(3); N.C. GEN. STAT. § 7A-377 (1979); OR. REV. STAT. § 1.420(2) (1977).

29. KY. SUP. CT. R. 4.130(3); N.Y. JUD. LAW 45 (McKinney Supp. 1979).

30. D.C. CODE ANN. § 11-1528 (1973).

31. CAL. CONST. art. 6, § 18(f); COLO. CONST. art. VI § 23(3)(d); KAN. STAT. § 20-176; KAN. SUP. CT. R. RELATING TO JUD. CONDUCT 607; MONT. REV. CODES ANN. § 93-723; MONT. R JUD. STANDARDS COMM'N 7; NEB. CONST. art. V, § 30(3); NEB. REV. STAT. § 24-726 (1979); NEV. CONST. art. 6, § 21(5); N.H. SUP. CT. R. 28; N.M. CONST. art. VI, § 32; R.I. R. COMM'N JUD. TENURE & DISCIPLINE 20 & 21; VA. CONST. art. VI, § 10; VA. CODE § 2.1-37.13.

come known, (2) there is broad public interest, and (3) confidence in the administration of justice is threatened.[32] In South Carolina and Vermont, such a statement may be issued at the request of the judge under investigation rather than at the commission's discretion.[33] Missouri also allows the commission to issue a public statement if the judge was cleared but the charge has become public.[34]

Four states make disclosure before the proceedings become public a punishable offense, usually contempt of court.[35] In Hawaii such disclosure is a felony punishable by not more than $5,000 or less than five years imprisonment, or both.[36]

There are many reasons advanced for these confidentiality provisions. Many complaints are rejected after an initial investigation discloses that the charges are frivolous or outside the commission's jurisdiction.[37] Submission of other complaints sometimes constitutes an attempt to use the commission to appeal from an adverse judgment. Such complaints are quickly disposed of.

When the system provides for confidentiality until a final recomendation is made, the reputations of the accused judge, and of the judiciary, are protected until a full-scale investigation has been made and a competent body of peers has made a decision on the merits. This is similar to the protection afforded a defendant under grand jury procedure.

Where a charge is minor, confidentiality allows the judge to correct perhaps unintentional transgressions and preserves his reputation while the corrective influence of the commission is exerted. Thus, a judge who would be reluctant to change his ways publicly, fearing that the public would see this as an admission of guilt, can privately improve the quality of his service. In this respect, confidentiality serves as an "educative tool."[38]

---

32. GA. R. JUD. QUALS. COMM'N 18; KY. SUP. CT. R. 4.130(1); LA. R. JUD. COMM'N 10; MD. R. OF PROCEDURE 1227; MINN. R. BD. JUD. STANDARDS 5(b); MO. R. COMM'N ON RETIREMENT, REMOVAL & DISCIPLINE 12.23(b); WIS. STAT. ANN. § 757.93(2) (West 1980); W. VA. R. P. FOR HANDLING COMPLAINTS AGAINST JUSTICES, JUDGES & MAGISTRATES 5.

33. S.C. SUP. CT. R. 33(C); VT. SUP. CT. R. FOR DISCIPLINARY CONTROL 6(12).

34. MO. R. COMM'N ON RETIREMENT, REMOVAL & DISCIPLINE 12.23(b).

35. FLA. R. JUD. QUALS. COMM'N 25; KY. SUP. CT. R. 4.130(3); PA. R. JUD. INQUIRY & REV. BD. 1(c); VT. SUP. CT. R. FOR DISCIPLINARY CONTROL OF JUDGES 6(10).

36. HAW. REV. STAT. § 610-3(b) (1976).

37. Buckley, *supra* note 5, at 253.

38. *Id.* at 255.

At any time during the proceedings, a judge's decision to resign or retire ends the process. Usually, if the situation is serious enough to warrant termination of service, a judge will voluntarily leave his or her post. Confidentiality allows the judge to do this and so avoid the time, expense and spectacle of a public trial. This solves the problem of the judge's misconduct while preventing a harmful effect on the public image of the judiciary. In the six years after the California commission was initiated, forty-four judges voluntarily left the bench during an investigation of their conduct in office.[39]

Another reason for confidentiality is that it allows the commissions to overcome opposition of the judiciary to their formation. Competent and discrete handling of cases has eradicated judicial resistance,[40] and judicial cooperation has in fact helped the process to work smoothly.

In sum, most judicial disability or misconduct cases conducted by special commissions end with the judge correcting his behavior or voluntarily resigning or retiring. The public image of the judiciary is thus protected, and at the same time judicial performance is improved. The commissions have been effective in improving the quality of judges; supporters of confidentiality assert that that result would be lost by public proceedings.

II

The Public Right to Know

The purpose of the First Amendment was to protect the freedom to publish matters of public concern, to ensure the right of free discussion, and to allow citizens to criticize the conduct of the government and governmental officials in the exercise of their authority.[41] Where speech concerns public affairs, it is the "essence of self-government."[42] The clause granting freedom of speech and of the press was intended as one of the

39. *Id.* at 256.

40. *Id.* at 260.

41. 2 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927).

42. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

guarantees of the people's right to know.[43] In Madison's words, "The right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right."[44] Although protection of the right to know is not the sole purpose of the First Amendment, it is certainly a major element.[45]

The Constitution, of course, does not contain an express provision for this right. Professor Henkin asserts that this is because the framers perceived such rights as retained by the people to be safeguarded against governmental infringement. Thus, although it may have been the principal rationale for freedom of the press, the right to know is a derivative of the right to publish and is coextensive with it.[46]

That the Constitution protects the right to receive information and ideas is now well established, and this right is recognized as fundamental to our free society.[47] However, a problem area is the right to seek out information, the most potentially significant aspect of the right to know. This is particularly true of the right to receive information from the government.[48] Moreover, the right to acquire information is a corollary of the right to publish. The flow of information to the public, guaranteed by freedom of the press, is curtailed as ways of acquiring it are blocked. When news is cut off at its source, the right to publish is compromised.[49] Thus, some right to gather information must exist.

The right to acquire and disseminate information is essential for informed decision-making in a democratic society. It is "vital as a mechanism for effectuating social change without resort to violence or undue coercion."[50] In a democracy there must be public discussion of public issues, and the communication of information bearing on those issues must not be infringed by the government. Theoretically, government is the people's agent in a democracy, and the people as ultimate gov-

43. Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957).

44. 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

45. Emerson, *Legal Foundation of the Right to Know*, 1976 WASH. U.L.Q. 1, 14.

46. Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971).

47. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

48. Emerson, *supra* note 45, at 14.

49. Branzburg v. Hayes, 408 U.S. 665, 728 (1972) (Stewart, Brennan, and Marshall, J.J., dissenting); Grosjean v. American Press Co., 297 U.S. 233, 243 (1936).

50. Emerson, *supra* note 45, at 2.

ernors must have absolute freedom of opinions and beliefs.[51] Many cases have emphasized the importance of the First Amendment guarantees to our system of representative self-government.[52]

The United States Supreme Court has recognized the right to know on a number of occasions. The concept, as understood by the Court, was first clearly expressed in *Lamont v. Postmaster General*.[53] A statute permitting the government to hold communist propaganda arriving in the mails from abroad was found to place an unjustifiable burden on the addressee's First Amendment right to acquire information. In *Stanley v. Georgia*,[54] a decision upholding the right to possess pornography at home, the Court stated, "It is now well established that the Constitution protects the right to receive information and ideas."[55] In another 1969 decision, *Red Lion Broadcasting Co. v. FCC*,[56] the Court held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[57]

Further, the Supreme Court has held that the First Amendment guarantees at least minimal access to certain governmen-

---

51. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257. The view of Professor Meiklejohn is that the First Amendment was the devise by which the people reserved significant powers to themselves. These powers, which he labels powers of "governing importance," are concerned with the governmental responsibilities of the public.

> Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

Id. at 257. Thus, in the Meiklejohn view, freedom of expression in areas of public affairs is an absolute right.

52. *See* Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Talley v. California, 362 U.S. 60 (1960); Bridges v. California, 314 U.S. 252 (1941); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota *ex rel* Olson, 283 U.S. 697 (1931).

53. 381 U.S. 301 (1965).

54. 394 U.S. 557 (1969).

55. *Id.* at 564.

56. 395 U.S. 367 (1969). "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Id.* at 390.

57. 395 U.S. at 390. Branzburg v. Hayes, 408 U.S. 665 (1972), also recognized this right. "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor it is suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681.

tal operations. Thus, even while denying requests by the press for special access to prisons, the Court has consistently taken pains to point out that the challenged restrictions do not foreclose all access, implying that some access is required.[58] Court decisions have many times alluded to the fact that the First Amendment was adopted to insure a vehicle by which the people would have access to information necessary for self-government.[59]

The courts have also consistently enforced the right of the public to be informed when the legislative or executive branches have attempted to conduct public business in secret. In fact, the judiciary deserves the credit for upholding the fundamental doctrine that allowable secrecy in government is a rare exception.[60]

Yet the right to know remains obscure, and the Supreme Court has even ignored the guarantee at times. In *Zemel v. Rusk*,[61] blanket restrictions on the right to travel to Cuba were upheld. In the later case of *Kleindienst v. Mandel*[62] the Court refused to give weight to the right of American citizens to hear a foreign lecturer who had been denied a visa.

The current status of the right to know, particularly the right of access to government information, is unclear. One reason for this state of affairs is that the Supreme Court's interpretation of the First Amendment is a relatively new area of law—most cases construing it having been decided only within the last fifty years—and so is recognized as being a likely subject of change by the Court.[63] The case of *New York Times Co. v.*

58. Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

59. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41-42 (1971); Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967); Rosenblatt v. Baer, 383 U.S. 75, 89-90 (1966) (Douglas, J., concurring).

60. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971).

61. 381 U.S. 1 (1965). The ban on travel was upheld for "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.* at 17 (emphasis added). The necessary implication is that some right to gather information does exist.

62. 408 U.S. 753 (1972). Note that although the Court refused to consider the First Amendment rights of the American in this case, it did recognize and discuss the general First Amendment right to receive information and ideas.

63. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 1-2 (1965).

Sullivan,[64] for example, has been seen as departing from previous tests and as adopting an interpretation similar to that of Professor Meiklejohn.[65] But that doctrine's status is further obscured by two recent cases, *Houchins v. KQED, Inc.* and *Gannett v. DePasquale*.[66]

Houchins concerned access by the press to certain areas in the Alameda County Jail in Santa Rita, California. It was a 3-1-3 decision with Justices Marshall and Blackmun not participating. Chief Justice Burger and Justices Rehnquist and White stated that there was no right of access to all sources of government information. Justice Stewart concurred in the result but felt that the press was entitled to more rights of access than the others had allowed. Justice Stevens, joined in a strong dissenting opinion by Justices Brennan and Powell, supported the public right to know the operations of government and to have access to them.

In *Gannett* the Supreme Court held that pre-trial proceedings in a criminal case can be closed to the public under certain circumstances. The decision centered on a defendant's Sixth Amendment right to a fair trial but, in dicta, members of the Court disagreed as to the public's right of access. In an opinion by Justice Blackmun, concurring in part and dissenting in part, in which Brennan, White and Marshall joined, a separate right of access by the public was strongly supported.[67]

Thus, it is clear that there is disagreement among the members of the Court about the status of the right to know and about the extent to which the public is entitled to have access to government information.

There has been legislative acceptance of the right to obtain information from government. This is demonstrated by the Freedom of Information Act[68] and by many state Sunshine Laws. Recognition of the right is also revealed in the legisla-

64. 376 U.S. 254 (1964). This case states that freedom of speech and press prohibits a public official from recovering damages for a defamatory statement relating to official misconduct unless he proves that statement was made with "actual malice," that is, with knowlege that it was false or with reckless disregard of whether it was false or not.

65. Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209. See note 51 and accompanying text, *supra*.

66. 438 U.S. 1 (1978); 443 U.S. 368 (1979).

67. 443 U.S. at 406.

68. 5 U.S.C. § 552 (1976 & Supp. III 1979).

tive history of the Freedom of Information Act,[69] which was intended to insure maximum disclosure of information held by governmental agencies.

Scope of the Public Right to Know

It is now well settled that the free speech right is governed by the due process clause of the Fourteenth Amendment and is protected from impairment by the states.[70] The prevailing view is that when a provision of the Bill of Rights, such as the free speech clause, is enforced against the states, it is enforced according to the same standards that apply against the federal government.[71] This is especially true regarding the entire First Amendment.[72] Moreover, according to federal standards, the First Amendment is to be given the broadest scope possible.[73]

The right to know is included in the First Amendment rights applicable to the states and must therefore be given a broad scope, coextensive with that Amendment. This is because the protection of the Bill of Rights goes beyond guarantees specifically enumerated and protects as well "those equally fundamental personal rights necessary to make the express guarantees fully meaningful."[74] As was discussed earlier, the right to know, though not fully defined, is essential to make the right of a free press meaningful.

The right of public access to judicial proceedings is a component of the right to know. It extends beyond the Sixth Amendment right to a fair trial and rests on broader First Amendment foundations.[75] The First Amendment protection of the public right to know differs, in its application to judicial proceedings, from the Sixth Amendment guarantee to a fair trial in three ways. First, it is based on the right of free discussion rather than on concern for just results in a particular case. Second, although the parties involved may wish to close a proceeding,

69. Note, *Access to Government Information and the Classification Process—Is There a Right to Know?*, 17 N.Y.L. FORUM 814, 819 (1971); Emerson, *supra* note 45, at 15.

70. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976); Talley v. California, 362 U.S. 60 (1959); Smith v. California, 361 U.S. 147 (1959); Near v. Minnesota, 283 U.S. 697 (1931).

71. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

72. Jacobellis v. Ohio, 378 U.S. 184, 191, 195 (1964).

73. Bridges v. California, 314 U.S. 252 (1941).

74. Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

75. United States v. Cianfrani, 573 F.2d 835, 862 (3rd Cir. 1978) (Gibbons, J., concurring).

the First Amendment, unlike the Sixth Amendment, compels an examination of the public interest as well. This is because the parties in an action are not concerned with the First Amendment rights of others. Third, the First Amendment right to know applies to civil as well as criminal trials.[76]

Very often the judicial process in civil cases is of no significance to anyone other than the litigants, but that is not always the case.[77] Finally, although the First Amendment provides that "*Congress* shall make no law . . . ," it has been applied to the executive and the judicial branches of government as well.[78] Thus, rules of court may not violate First Amendment rights.

The press enjoys the same right of access to public proceedings as the public in general.[79] However, the press does not have a right of access greater than that of the public.[80] The press is therefore free to report what goes on in open court but is not granted any special access to otherwise closed proceedings.[81]

In sum, the scope of the First Amendment right to know extends to limit the governmental power of the states to the same extent that it limits the federal government. This means that it must be given the broadest scope possible. It is distinct from the Sixth Amendment right to a public trial and applies to civil as well as criminal trials. Further, this right may not be abridged by the executive branch or by the judiciary.

The rights guaranteed by the First Amendment are not unlimited or unqualified though. And the right to know, like other First Amendment rights, is subject to reasonable restrictions when necessary to protect the public interest.

The government has always asserted the right to conceal some information. There were secret proceedings in Philadelphia in 1787, and the Constitution provides for publication of a Congressional Journal for each House except for those parts

76. *Id.* at 862. *See also* Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978).

77. *See, e.g.*, Brown v. Board of Education of Topeka Kansas, 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sanford, 60 U.S. 393 (1857).

78. Henkin, *supra* note 46, at 277 (Emphasis added).

79. 573 F.2d at 861.

80. Branzburg v. Hayes, 408 U.S. 665, 684 (1972).

81. United Press Ass'n v. Valente, 203 Misc. 220, 120 N.Y.S.2d 642, *aff'd*, 281 App. Div. 395, 120 N.Y.S.2d 172 (1953).

deemed secret.[82] The President is also privileged to keep some secrets.[83] The Supreme Court has repeatedly recognized this privilege because of the need for some secrecy in executive activities.[84]

There are various justifications for governmental secrecy. Military secrecy in time of war is one;[85] national security in peacetime,[86] the need to conduct foreign policy,[87] and the proper exercise of state police power[88] are others.

The power to abridge First Amendment freedoms, however, is the exception rather than the rule, and there must be a reasonable apprehension of danger to the public interest or to organized government to allow such restriction.[89] Exceptions to the right to know should be limited to those absolutely essential to the effective operation of government.[90] Whether such restrictions are necessary has been determined by using the "clear and present danger" test, first formulated in *Schenk v. United States*.[91] This test has not been rigidly or mechanically applied, however, and each case depends upon the substantiality of the public interest being protected and upon the extent to which First Amendment freedoms are abridged. Thus, in each case the court must balance these two factors.[92]

---

82. U.S. CONST. art. I, § 5.

83. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

84. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 16-17 (1964); United States v. Reynolds, 345 U.S. 1, 10 (1953).

85. Abrams v. United States, 250 U.S. 616 (1919).

86. Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); Communist Party of the United States v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954).

87. Henkin, *supra* note 46, at 275. Diplomatic communications are confidential because disclosure might cause chaos or unfair advantages to the recipient.

88. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Gitlow v. New York, 268 U.S. 652 (1925).

89. Herndon v. Lowry, 301 U.S. 242 (1937).

90. Emerson, *supra* note 45, at 16.

91. 249 U.S. 47 (1919) (restriction must be necessary to prevent a grave and immediate danger to interests which the government may lawfully protect). The test formulated in *Schenk* has been modified by later cases. In Dennis v. United States, 341 U.S. 494, 510 (1951), the Court held that the gravity of the evil must be discounted by its improbability and that only those means necessary can be used where a restriction on speech is permissible. In Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the Court emphasized that the danger must be imminent.

In the recent case of Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), the Supreme Court, in considering a state's ability to punish a third person for breaching the confidentiality of a judicial investigation, questioned the relevance of the clear and present danger test but relied on cases which are couched in clear and present danger terms for its decision. *Id.* at 839-46.

92. See note 96 and accompanying text, *infra*.

III

Resolving the Conflict Between Confidentiality of Judicial Investigations and the Public Right to Know

Typical Approaches to Such Conflicts

As previously discussed, the rights protected by the First Amendment are not absolute rights, though limitations are permissible only in exceptional cases.[93] Limitations are permitted only if the interest being protected is substantial and there is a public interest that is "compelling" or "paramount."[94] Legislative restrictions are allowed only to prevent a grave and immediate danger to interests which the state or federal government may lawfully protect.[95] Statutes that infringe on First Amendment freedoms but are not sufficiently justified are null and void.[96] Where legislation is alleged to violate these freedoms, a court must examine the effects of the infringement and weigh them against the substantiality of the reasons for the restriction.

The court, in each case, balances the extent to which the protected rights are violated against the substantiality of the social interest sought to be furthered by the restriction.[97] Judicial balancing of competing interests is required even for the "preferred" freedoms of the First Amendment.[98]

However, First Amendment rights are entitled to special safeguards.[99] In First Amendment balancing cases, courts apply a "least restrictive means" approach. An action which infringes on these rights is allowed only if it cannot be achieved by less burdensome means.[100] Where a less drastic way is

93. Near v. Minnesota, 283 U.S. 697 (1931).

94. NAACP v. Button, 371 U.S. 415 (1963); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Thomas v. Collins, 323 U.S. 516 (1945).

95. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

96. *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948); Jones v. Opelika, 316 U.S. 584 (1942); Schneider v. State, 308 U.S. 147 (1939).

97. Thornhill v. Alabama, 310 U.S. 88 (1940); Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 912 (1963).

98. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Konigsberg v. State Bar of Cal., 366 U.S. 36, 51 (1961).

99. Branzburg v. Hayes, 408 U.S. at 738.

100. *See, e.g.*, Police Dept. v. Mosley, 408 U.S. 92, 101 (1972); Dunn v. Blumstein, 405

available, the more restrictive actions are impermissible. Justifiable governmental goals cannot be achieved by unduly broad means.

Thus, the court must consider the interests protected by confidentiality and weigh them against the public interest in open proceedings. First Amendment rights are entitled to special safeguards and can be restricted only when a substantial evil will otherwise result, when there is a substantial danger to interests which a government may lawfully protect, and where the restriction is the least intrusive means of achieving the legitimate governmental goal.[101]

Interests in Open Proceedings

The interests sought to be protected by confidentiality of judicial investigations, such as protection of the reputation of the judiciary, have already been discussed. The countervailing interests in open proceedings will now be examined.

Knowledge of government is essential to the informed decision-making that is the essence of self-government. "Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."[102] The public, as sovereign, must have the maximum possible information for a democracy to work.[103]

In forty states citizens elect their judges, either directly or in a confirmation or retention election.[104] Without knowledge of

U.S. 330 (1972). *See also* Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

101. See notes 37-40 and accompanying text, *supra*.

102. 6 WRITINGS OF MADISON 398 (Hunt ed. 1906).

103. Emerson, *supra* note 45, at 14.

104. ALA. CONST. § 6.13 of Amendment No. 328 (1973); ALASKA STAT. §§ 22.05.080, 22.05.100, 22.10.150, 22.15.195 (1976); ARIZ. CONST. art. VI, §§ 4,12,32; ARK. CONST. ART. 7, §§ 6,13,19,20; CAL. CONST. art. 6, §§ 3,6,16; CAL. GOV'T CODE § 71141 (West 1976); COLO. CONST. art. 6, § 20(2); FLA. CONST. art. 5, § 10; GA. CONST. art. VI, § II; Paras. III, VIII; § III, Para. II; § VII, Para. III; IDAHO CODE § 1-201, 1-702 (1979); ILL. CONST. art. VI, § 12; IND. CONST. art. 7, § 11; IOWA CONST. art. 12, § 16; KAN. STAT. §§ 20-105, 25-111 (1979); KY. CONST. §§ 110, 113, 140, 99, 142; LA. CONST. art. 5, §§ 4, 9, 15, 22; MD. CONST. art. IV, §§ 3, 5; MICH. CONST. art. VI, §§ 2, 8, 12, 16; MINN. CONST. art. 6, § 7; MISS. CODE ANN. §§ 23-5-235, 23-5-239 (1972); MO. CONST. art. V, § 29 (C)(1); MONT. CONST. art. VII, §§ 5, 8; NEB. CONST. art. V, § 21; NEV. CONST. art. 6, §§ 3, 5, 7; N.J. CONST. art. VI, §§ 4, 12, 26; N.Y. CONST. art. 6, §§ 2, 6, 9, 10, 12, 13, 15, 16, 17; N.C. CONST. art. IV, §§ 9, 10, 16; N.D. CONST.

the quality of a judge's performance, an informed vote is not possible. A cornerstone of American citizenship is the right to criticize public persons, and it is essential that the record of a candidate for office, including a judge, be subject to public scrutiny and discussion.[105]

Open governmental proceedings ensure that the public can observe and prevent repressive or unfair actions by the government. The "Watergate" investigations demonstrated how vital exposure of illegal or questionable governmental practices is to effectuate "government by the people."[106] Thomas Jefferson believed that liberty could be protected only by such public scrutiny.[107]

Further, open proceedings preserve the credibility of the judicial system by making available the testimony and evidence upon which a judicial determination is made. This opening of governmental processes to the citizens builds confidence in the system.[108] The public is also educated about governmental processes and develops a greater understanding of the rule of law. Secret hearings breed distrust no matter how fair they actually are. Secret judicial action breeds distrust of the courts and undermines confidence in the impartiality and competence of judges.[109]

Finally, extensive public scrutiny guards against actual mis-

---

art. IV, §§ 90, 104, 100, 112, 113; OHIO CONST. art. IV, § 6; OKLA. CONST. art. 7, §§ 3, 9, 11, 18; OR. REV. STAT. §§ 252.050 (1979); PA. CONST. art. 5, § 13; S.C. CONST. art. V, § 3; S.D. CONST. art. V, § 7; TENN. CONST. art. 6, §§ 3; S.D. CONST. art. V, § 7; TENN. CONST. art. 6 §§ 3, 4; TEX. CONST. art. 5, §§ 2, 4, 7; UTAH CODE ANN. § 20-1-7.1 (1977); WASH. REV. CODE ANN. § 2.04.071 (Supp. 1980); W. VA. COST. art. 8, §§ 2, 5, 10; WIS. CONST. art. 7, §§ 4, 7, 14, 15; WYO. CONST. art. 5, §§ 4, 19.

105. According to Cooley, the purpose of the First Amendment was:

> to guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters . . . .

2 COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927).

106. Emerson, *supra* note 45, at 18.

107. In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends upon the freedom of the press, and that cannot be limited without being lost.

9 PAPERS OF THOMAS JEFFERSON 239 (J. Boyd ed. 1954).

108. United States v. Cianfrani 573 F.2d 835, 853 (3d Cir. 1978). *See also*, 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834, 335 (1979).

109. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976); 573 F.2d at 851.

carriage of justice. If police, prosecutors, and judicial officials know they are being observed, they are less likely to engage in illegal activities. The press often capitalizes on public suspicion of injustice or impropriety, but the fair administration of justice is a legitimate concern theoretically underlying publicity.[110]

The recent public investigation of the California Supreme Court was criticized for its "carnival atmosphere." However, such an atmosphere is not a necessary part of public proceedings and may be prevented by proper administration. Some criminal trials have engendered widespread publicity, yet fair trials were still possible.[111] The cases demonstrate that widespread publicity does not invariably lead to an unfair trial.[112]

Balancing the Interests

State confidentiality provisions have never been challenged on First Amendment grounds. In the recent case of *Landmark Communications, Inc. v. Virginia*,[113] the Supreme Court held that a state's interest in confidentiality is not sufficient to justify punishment of a third person, not a party to the inquiry, who improperly divulged information regarding confidential proceedings of the state's judicial review commission. The Court declined to consider the state's power to keep proceedings confidential or the right of the press to gain access to such proceedings.[114]

The recent "Tanner Investigation" of the California Supreme Court was closed because of a provision in the California Constitution which provides for confidentiality of such proceedings.[115] The constitutionality of the provision was not challenged.[116] Other state cases in which confidentiality was considered were also based entirely on state statutory or constitutional confidentiality provisions without any First Amend-

110. Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1906 (1978).

111. *See, e.g.*, Murphy v. Florida, 421 U.S. 794 (1975); Beck v. Washington, 369 U.S. 541 (1962); Stroble v. California, 343 U.S. 181 (1952).

112. 427 U.S. at 554.

113. 435 U.S. 829 (1978).

114. "Landmark does not challenge the requirement of confidentiality. . . . We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential. . . ." *Id.* at 834, 836-37.

115. CAL. CONST. art. 6, § 18(f).

116. Mosk v. Superior Court of Los Angeles County, 25 Cal. 3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979).

ment challenge.[117] Thus, no court has ever considered whether confidential investigations of the judiciary and confidential removal hearings impermissibly abridge the public's right to know.

As discussed earlier, an analysis of the constitutionality of confidentiality provisions involves weighing the interests protected by confidentiality against the interests in open proceedings. In addition, the least restrictive means must be used to achieve the legislative purpose.

In view of that standard, of all the systems presented the most desirable are those where the proceedings are confidential only until a formal hearing is ordered upon a finding of good cause for the charge.[118] This procedure most closely parallels a grand jury and is the least restrictive alternative. The interests on both sides are protected. The judge's reputation is protected against frivolous or malicious complaints, while the public is allowed access to the consideration of the merits of the charge. The judge may voluntarily resign or retire before the formal hearing is held, which allows for a quick solution. But, if a judge decides to stay and defend himself against the charge, the appearance of justice and the educative function of open proceedings are preserved.

Systems which allow the record to become available for public scrutiny after a recommendation is filed with the Supreme Court[119] are less desirable under the "least restrictive means" standard. The public's rights are abridged more than is necessary: although citizens can read the record, they are denied the right to observe the proceedings. This defeats the educative function of open proceedings, although preserving the appearance of justice. Whether these rules would be held unconstitutional depends upon how much weight the justices deciding the issue assign to First Amendment rights and how absolute they believe such rights to be.

Procedures which provide for confidentiality of all proceedings unless the judge under investigation requests otherwise[120] are also inadequate to protect the rights of the public. The in-

117. *See, e.g.*, McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 116 Cal. Rtpr. 260, 526 P.2d 268 (1974); Nichols v. Gamso, 35 N.Y.2d 35, 315 N.E.2d 770, 358 N.Y.S.2d 712 (1974).

118. See note 21, *supra*, and accompanying text.

119. See note 22, *supra*, and accompanying text.

120. See notes 27-30, *supra*, and accompanying text.

terest of the public is separate from that of the judge under investigation and, as in a criminal trial, these societal interests are often antagonistic to the interests of the judge.[121] This method is too restrictive since the public's right to know is completely dependent upon whether the judge, in his own interest, requests an open proceeding.

Some states allow for public disclosure only if it has resulted in broad public knowledge about the proceeding.[122] Again, this is overly restrictive. It fallaciously assumes that the public interest arises only upon being informed that there is an investigation under way. Yet the public interest in the fair administration of justice is pervasive and is perhaps stronger in the event of secret proceedings.

State rules which provide for confidentiality of all proceedings with no disclosure of the record protect only the interest of the judge and completely restrict the public's right to know. There is no balance here; only the reasons supporting confidentiality are weighed. Such procedures could be held unconstitutional, particularly since there are far less restrictive means available.

Conclusion

The state commissions have been effective in improving the quality of the judiciary. There are reasons why at least some of their operations should be confidential. These include protection against frivolous and malicious complaints, preservation of the ability of judges to correct unintentional minor transgressions, preservation of the reputation of the judiciary as a whole, and encouragement of voluntary resignation or retirement.

Some rules provide for confidentiality only until a preliminary investigation is completed and good cause is found for the charges. Other states forbid any public disclosure other than the final disposition of the case. And there are many variations between these extremes.

There is no explicit statement in the Constitution of the public right to know, but it is a corollary of freedom of the press because without access to information, the right to publish is curtailed. Further, the right of access to governmental infor-

121. United States v. Cianfrani, 573 F.2d 835, 852 (3d Cir. 1978).

122. See note 32, *supra*, and accompanying text.

mation is essential in a democracy. Self-government can only be effective if there is an informed electorate. The right to know has been repeatedly recognized by the courts, although its scope and perimeters remain unclear. There is no doubt, however, that this right exists and that state confidentiality rules must be balanced against it.

Some of the state confidentiality provisions present no problem. Where the preliminary investigation alone is confidential, the commission parallels a grand jury in its operation. This is the least restrictive means of achieving the legislative goal while still preserving some public right of access.

But most states extend confidentiality further. There are the borderline cases where the record is later made available to the public. This abridges the public's rights more than is necessary but preserves the appearance of justice. Another borderline case is where confidentiality depends upon the wishes of the judge under investigation. This ignores the separate public interest in open proceedings and is overly restrictive. Whether these borderline cases are constitutionally permissible depends upon the weight given to First Amendment rights by those deciding the question.[123] In view of the less restrictive alternative available, their constitutionality is doubtful.

Some states make disclosure of confidential proceedings before their commission a punishable offense. After *Landmark Communications, Inc. v. Virginia*,[124] such provisions are clearly unconstitutional, at least insofar as they are applied to third persons.

Most restrictive are rules which provide for confidentiality of all proceedings with only the final outcome made public. This protects the interests on one side of the balance only and ignores completely the rights of the public. Such rules are impermissible restrictions on First Amendment rights and, as such, are unconstitutional.

The time for secrecy in investigations of the judiciary has passed. As the other branches of government are being subjected to public scrutiny, so must the judicial branch. Perhaps some degree of secrecy is necessary in order to protect the judiciary from political pressure and frivolous charges. But once a judge has been accused of misconduct or incapacity, and

123. See note 31, *supra*, and accompanying text.

124. 435 U.S. 829 (1978). See text accompanying note 113, *supra*.

good cause for the charge has been shown, the public must be allowed to observe the subsequent proceedings. This scrutiny alone will advance public acceptance of the courts' legitimacy and permit informed decision-making by citizens when they exercise the right of self-government.

Appendix

State Confidentiality Provisions

Alabama: ALA. CONST. art. VI, § 156(b), Rule 5 of the Rules of Procedure of the Judicial Inquiry Comm'n.

Alaska: ALASKA STAT. § 22.30.060 (1976), Rule 2 of the Rules of the Comm'n on Judicial Qualifications.

Arizona: ARIZ. CONST. art. 6.1, § 5, Rule 10 of the Rules of Procedure for the Comm'n on Judicial Qualifications.

Arkansas: ARK. STAT. ANN. §§ 22-145(f), 22-1004(b) (1979).

California: CAL. CONST. art. 6, § 18(f).

Colorado: COLO. CONST. art. 6, § 23(b), Rule 3 of the Rules of Procedure of the Comm'n on Judicial Qualifications.

Connecticut: CONN. GEN. STAT. §§ 51-51c, 51-51d, 51-51l, 51-51j (1979).

Delaware: DEL. CONST. art. IV, § 37, Rule 10(d) of the Rules of Procedure of the Court on the Judiciary.

Dist. of Columbia: D.C. CODE ANN. § 11-1528 (1973), Rule 1.4(b) of the Rules and Regulations of the Comm'n on Judicial Discipline and Tenure.

Florida: FLA. CONST. art. 5, § 12(d), Rule 25 of the Rules of the Judicial Qualifications Comm'n.

Georgia: GA. CONST. art. VI, § 13, Rule 18 of the Rules of the Judicial Qualifications Comm'n.

Hawaii: HAW. REV. STAT. §§ 610-3(a), 610-3(b) (1976), Rule 15 of the Rules of Practice and Procedure of the Comm'n on Judicial Qualifications.

Idaho: IDAHO CODE § 1-2103 (1979), Rule 24 of the Rules of the Judicial Council.

Illinois: ILL. CONST. art. VI, § 15(c), Rule 5 of the Rules of Procedure of the Judicial Inquiry Bd.

Indiana: IND. CONST. art. 7, § 11(2), IND. CODE ANN. § 33-2.1-5-3 (Burns 1975), Rule 5 of the Rules of the Judicial Qualifications Comm'n.

Iowa: IOWA CODE ANN. § 605.28 (West 1975).

Kansas: KAN. STAT. § 20-176 (1979), Rule No. 607 of the Rules of the Supreme Court Relating to Judicial Conduct.

Kentucky: Rule 4.130 of the Supreme Court Rules.

Louisiana: LA. CONST. art. 5, § 25(C), Rule 10 of the Rules of the Judicial Comm'n.

Maryland: MD. CONST. art. IV, § 4B(a), Rule 1227 of the Rules of Procedure.

Massachusetts: Rule 3 of the Rules of the Committee on the Judicial Responsibility.

Michigan: MICH. CONST. art. VI, § 30(2), Rule 932.22 of the Supreme Court Administrative Rules.

Minnesota: Rule 5 of the Rules of the Comm'n on Judicial Standards.

Missouri: Rule 12.23 of the Rules of the Comm'n on Retirement, Removal and Discipline.

Montana: MONT. REV. CODES ANN. § 93-723 (1977), Rule 7 of the Rules of the Judicial Standards Comm'n.

Nebraska: NEB. CONST. art. V, § 30(3), NEB. REV. STAT. § 24-726 (1979), Rule 2 of the Rules of the Comm'n on Judicial Qualification.

Nevada: NEV. CONST. art. 6, § 21(5).

New Hampshire: Rule 28 of the Supreme Court Rules.

New Jersey: Rule 2:15-11(e) of the Rules Governing Appellate Practice in the Supreme Court and Appellate Division of the Superior Court.

New Mexico: N.M. CONST. art. VI, § 32, Rule 7 of the Procedural Rules and Regulations of the Judicial Standards Comm'n.

New York: N.Y. JUD. LAW § 44 (McKinney Supp. 1979).

North Carolina: N.C. GEN. STAT. § 7A-377 (Supp. 1979), Rule 4 of the Rules of the Judicial Standards Comm'n.

North Dakota: N.D. CENT. CODE § 27-23-03(5) (Supp. 1979), Rule 4 of the Rules of Procedure of the Judicial Qualifications Comm'n.

Ohio: Rule 21 of the Supreme Court Rules of Practice.

Oklahoma: OKLA. STAT. ANN. tit. 20, § 1658 (West Supp. 1979), Rule 5(C) of the Rules of the Council on Judicial Complaints.

Oregon: OR. REV. STAT. § 1.420(2) (1977), Rule 7 of the Rules of Procedure of the Comm'n on Judicial Fitness.

Pennsylvania: PA. CONST. art. 5, § 18(h), Rule 20 of the Rules of Procedure of the Judicial Inquiry and Review Bd.

Rhode Island: Rules 20 and 21 of the Rules of the Comm'n on Judicial Tenure and Discipline.

South Carolina: Rule 33 of the Rules of the Supreme Court.

South Dakota: S.D. CONST. art. V, § 9, S.D. CODIFIED LAWS ANN. § 16-1A-4 (1979), Rule 4 of the Rules of the Judicial Qualifications Comm'n.

Texas: TEX. CONST. art. 5, § 1-a(10), Rule 19 of the Rules for Removal or Retirement of Judges.

Utah: UTAH CODE ANN. § 78-7-30(3) (1977).

Vermont: Rule 6(7) of the Rules of the Supreme Court for Disciplinary Control.

Virginia: VA. CONST. art. VI, § 10, VA. CODE § 2.1-37.13 (1979), Rule 10 of the Rules of the Comm'n on Judicial Inquiry and Review.

West Virginia: Rules 3 and 5 of the Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates.

Wisconsin: WIS. STAT. ANN. § 757.93 (West 1980), Rules 2 and 3 of the Rules of Procedure of the Judicial Comm'n.

Wyoming: Rule 7 of the Rules of the Judicial Supervisory Comm'n.